ENGLAND by Ann Blair and Paul Meredith

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Overview

The governance of school education, and the fundamental rights arising in the context of education, have a very high place on the political and social agenda in England. Education has always had an important place in political debate, and has for long been a significant determinant of social change and mobility, but school education in England has been at the forefront of political and social conflict since the movement towards 'comprehensive' secondary education was instigated by the Labour party in the 1950s. This movement, which gathered pace in the 1960s and 1970s, sought to end academically selective secondary schooling, replacing the educationally and socially divisive grammar and secondary modern school system with a system of comprehensive schools for all pupils irrespective of ability.

School education remained at the centre of political discourse in England throughout the 1970s: the then Labour Prime Minister, James Callaghan, responded to widespread concern over declining educational standards and increasing radicalisation of teaching [1] by promoting a 'great debate' on education in an influential speech in 1976. Margaret Thatcher, who succeeded Callaghan as Prime Minister in May 1979, maintained the prominence of education in political debate, and treated education as a vehicle for many aspects of her political and social philosophy, including individualism, freedom of choice, accountability, traditional family values and market forces. The 1979-1997 Conservative administration introduced perhaps the most radical reforms of the school system in England since the seminal Education Act 1944, which had laid the essential foundations of the post-Second World War education system.

Foremost among the Thatcher reforms was the introduction of a national curriculum under the Education Reform Act 1988, transforming the secular curriculum in English schools within a relatively short time span from one of the most decentralised to one of the most

highly centralised in Europe, although the level of centralised prescription has since been modified. Other key reforms during the tenure of this Conservative government included subjecting the maintained school system to some of the rigours of the market place, principally through enhancing parental choice of school and establishing a school funding model with the number of pupils on the school roll as a central determinant, thereby subjecting schools to an element of 'consumer' choice.[2] In practice parental choice has worked very unevenly across the country, has overwhelmingly favoured schools in relatively wealthy and attractive neighbourhoods, and has caused many schools in deprived inner-city areas to enter a spiral of decline, in many cases leading to closure. Other reforms introduced under this administration included permitting schools to 'opt out' of local authority control in favour of 'grant-maintained' status with funding from central government; [3] the delegation of many school management and budgetary responsibilities from local authorities to school governing bodies; increasing parental representation on those governing bodies; and imposing some highly controversial curricular constraints in the context of political and sex education, the best known example being the prohibition of the 'promotion' of homosexuality as a 'pretended family relationship' under the much ridiculed section 28 of the Local Government Act 1988 (repealed eventually by section 122, Local Government Act 2003).

In the general election of May 1997, a Labour government was returned to power, led by Tony Blair until July 2007, and then by Gordon Brown until the May 2010 general election. The Labour administration continued and further embedded many of the reforms introduced under the Conservative administration, although it abolished grant-maintained status and returned schools which had 'opted-out' to the local government fold, mainly as foundation schools. The main focus of the Labour government was, however, on enhancement of educational standards, and in the School Standards and Framework Act 1998, it introduced a raft of measures designed to raise standards and to increase the scope and effectiveness of school inspection.[4] [5] While it abolished grant-maintained status, the Labour government in the Education Act 2002 introduced a not wholly dissimilar status in the form of 'academies', discussed below. It also strongly encouraged schools to specialise in particular areas of provision such as science, technology, drama, art or sports, and it strongly encouraged the establishment of faith schools within the state maintained sector. The Conservative-Liberal Democrat coalition government formed following the May 2010 general election has sought to expand the academies programme, to increase parental and community choice and engagement with the development of 'free' schools, and has introduced legislation designed to enhance teachers' disciplinary powers, including powers to search pupils, in order to tackle the growing problem of violence and the taking of drugs in schools.[6]

These policy and legislative initiatives have been paralleled by a different, though in many ways related, development in the form of an increasing recourse to legal challenge in courts and tribunals in the context of education. In addition to the establishment of important tribunals to resolve disputes, especially over provision for children with special educational needs, the courts have become much more involved with the world of education in recent years. While the trend towards legal challenge was already evident in the 1970s with such landmark cases as *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* in 1976 over comprehensive reorganisation, the incidence and nature of

legal challenge has taken on a major new dimension since the enactment of the Human Rights Act 1998, which brought most of the Articles of the European Convention on Human Rights and Fundamental Freedoms (ECHR) directly within the jurisdiction of the UK courts. Important legal challenges in the sphere of education, based on claims that individual rights under the ECHR have been infringed by public authorities, are now brought with considerable regularity in such contexts as school discipline,[7] the wearing of dress affiliated to particular religious convictions,[8] choice of school,[9] and educational provision for pupils with special educational needs.[10] This juridification of educational issues has, indeed, been one of the key developments in the field, reflecting the embedding of a 'rights culture' and the promotion of individualism over collective values within society.

The structure of schooling

The current structure of state schooling in England[11] is usually said to derive from the Education Act 1944, a seminal enactment intended as a key foundation stone for the post-Second World War era. Under the previous structure, there was no universal system of secondary education: the vast majority of children ended their schooling at the age of 14 years, having attended elementary schools, while a fortunate few, whose parents could afford it, or who were selected on the basis of ability for a free place, attended fee paying grammar schools up to the age of 17 or 18 years. This was extremely divisive as well as being manifestly wasteful of talent.

The 1944 Act radically reorganised the structure of state schooling in England, with primary schools up to age 11, and a 'tripartite structure' of secondary schools, the aim (never realised in practice) being that each of the three types of secondary school should enjoy 'parity of esteem'. The Act envisaged grammar schools for a minority of pupils selected on the basis of ability at the age of 11, secondary modern schools for the majority of children, and technical schools for pupils with an aptitude for vocationally orientated technical education. In practice, few technical schools were established, and so the pattern that emerged was a bipartite structure of grammar and secondary modern schools, the minimum leaving age being raised to 15 years (raised in 1972 to 16), and a prohibition on the charging of fees within the state maintained sector.

A further major reform under the 1944 Act was the establishment of a new settlement for religious foundation schools, at that time overwhelmingly of the Christian faith and established either by the Church of England or the Roman Catholic Church, and many of which were in severe financial difficulty. The Act enabled these schools to be brought within the maintained schools framework alongside the non-denominational 'county' schools. These 'denominational' schools were given the new status of 'voluntary' schools – of which the two largest categories were voluntary controlled and voluntary aided – with substantial financial support from the state.

Under the 1944 Act, there was thus a twofold classification of state schools: firstly, schools were classified into primary and secondary schools, with secondary schools being classified further into grammar and secondary modern. Secondly, schools were classified into county (non-denominational) schools, which were established and wholly funded by the state

through the local education authority; and voluntary schools, which were given either controlled or aided status, depending on the extent of the state funding which they received, and on the level of local education authority control over the running of the school.

The settlement established under the 1944 Act lasted only for a decade or so before a substantial movement for change emerged, in part through the Labour party, in recognition of the continuing social and educational divisiveness inherent in the selection of a minority of pupils at 11-plus for grammar school places, while the majority of children attended non-selective secondary modern schools. The Labour governments of 1964-1970 and 1974-1979 sought to bring about fundamental reform of the structure of secondary schools through the introduction of non- academically selective 'comprehensive' secondary schools serving all pupils in their respective areas.[12] They placed considerable pressure upon local education authorities to submit plans for comprehensive reorganisation,[13] and many local battles were fought between Conservative-controlled local education authorities and the central government, some of which reached the courts. In 1976 the Labour government lost patience with local authorities and introduced a formal statutory requirement in the Education Act 1976 to submit reorganisation plans, but by the time of the 1979 general election comprehensive reorganisation was still far from complete. The incoming Conservative government repealed the 1976 Education Act, but reorganisation plans still continued to be submitted by a number of authorities. Today the overwhelming majority of maintained secondary schools are comprehensive, although there remain some 46 selective grammar schools, and a limited amount of selection on the basis of ability (or aptitude in particular fields such as music, art, drama or sport) is permitted in some other schools. Although there are statutory restrictions on the development of further Grammar Schools the freedom of schools to expand has taken an interesting turn with Kent County Council recently approving the expansion of two different state Grammar Schools (a girl's school and a boy's school) onto a new site in Sevenoaks, a town with no Grammar School of its own. This has been referred to as a "satellite" school.

While comprehensive reorganisation has been by far the most important structural change in the years since 1944, the organisation of schools has been amended in a number of other significant respects: the present framework dates from the School Standards and Framework Act 1998. Section 20 of this Act categorised state maintained schools as community schools (in essence, the former 'county' schools), voluntary controlled and voluntary aided schools, and 'foundation' schools. There are also special schools within the local authority maintained sector for pupils with more severe special educational needs, for whom education in mainstream schools is inappropriate. This Act abolished grant-maintained schools and returned most grant-maintained schools back within the local authority maintained sector as foundation schools.

A small number of city academies and city colleges for the technology of the arts with private sponsorship were established under the Education Reform Act 1988 (section 105), and this idea was taken further by the Blair Labour government by the creation of city academies under the Learning and Skills Act 2000. These were schools with specialist focus on such areas as art or technology. The Labour government in the Education Act 2002 sought to bring these categories together under the single heading of 'academies', and to encourage schools to convert to academy status. Academies are discussed further in section 6 below.

The legal framework

In the absence of an entrenched documentary (written) constitution, there is strictly no form of 'higher law' with which ordinary legislation enacted by the UK Parliament at Westminster must conform. The highest form of law within the UK constitution takes the form of Acts of the UK Parliament, and, by virtue of the principle of the sovereignty of Parliament, no court or other body may question the authority of a duly enacted Act of Parliament. That is the theory: in practice, however, there are clearly many political constraints upon Parliament in the enactment of legislation; by virtue of the UK's membership of the European Union and the principle of the primacy of EU law over the national law of member states, provisions of UK law which conflict with enforceable EU law may be disapplied by UK courts; and the Human Rights Act 1998 now requires public authorities in the UK to comply with rights arising under the ECHR, and superior courts may issue a declaration of incompatibility in the event of their finding an irresolvable incompatibility between a provision in a UK statute and a provision in the ECHR, although this does not strictly disapply the statutory provision concerned. It should also be noted that education is generally a devolved matter, and therefore the UK Parliament, although in theory capable of enacting legislation for all parts of the UK, in practice legislates in the main for England.

This unusual constitutional framework means in effect that Acts of Parliament generally prevail over all else, and the courts must enforce them, subject to their extensive powers of interpretation. The vast majority of education law is, indeed, based on Acts of Parliament, amplified in many cases in great detail by delegated legislation, normally promulgated by the government under the authority of 'parent' Acts and subject in many cases to rather inadequate Parliamentary supervision. In addition to Acts of Parliament and delegated legislation, the Secretary of State issues through the Department for Education a considerable volume of 'soft law' in the form of codes of practice and guidance, addressed to local authorities, school governing bodies, head teachers and parents on many issues.

The role of the Secretary of State for Education as a senior government minister and member of the Cabinet and political head of the Department for Education is very wide-ranging: the Secretary of State has overall responsibility to 'promote the education of the people'.[14] In one sense, this is almost meaningless, but on the other hand it gives the Secretary of State a legitimate concern with all aspects of education. S/he has overall political responsibility to Parliament and, ultimately, to the electorate, for national education policy, for translating that policy where appropriate into legislation, for piloting the legislation through Parliament, and for the macro-economic management of the system.

Local authorities have the core responsibility of contributing towards the 'spiritual, moral, mental and physical development of the community' by securing the provision within their respective areas of sufficient schools to meet the needs of the population,[15] and, so far as possible should carry out their functions with a view to promoting high standards, ensuring fair access to opportunity for education and promoting the fulfilment of learning potential.[16] They are required to secure provision of sufficient primary and secondary schools in their area to secure 'appropriate education' offering such variety of instruction and training as

may be desirable in view of pupils' different ages, abilities and aptitudes,[17] and to exercise their functions with a view to securing diversity in the provision of schools and increasing opportunities for parental choice.[18]

Every school is required to have a governing body with corporate status,[19] and the composition of the governing body varies in accordance with the category of school. The composition and constitution of governing bodies is dealt with in detail by regulations and by the school's instrument of government. A community school's governing body will include representatives of parents, the school staff, the local authority and the community served by the school. Different provisions apply to other categories of school. The conduct of the school is under the direction of the governing body,[20] and the governors have overall financial responsibility, its budget being delegated to it by the local authority. Day to day responsibility for running the school is, however, the responsibility of the head teacher. The governing body is required in discharging their functions as to the conduct of the school to 'promote the well-being of the pupils' and to 'promote community cohesion'.[21] The governors must also have regard to any relevant children and young people's plan, reflecting the relationship between educational provision and the local authority's wider social care responsibilities,[22] and have regard to any views expressed by parents of registered pupils.[23]

Parents for their part are under a statutory duty to ensure that their children of compulsory school age[24] receive 'efficient full-time education' suitable to their age, ability and aptitude and any special educational needs they may have, either by regular attendance at school or otherwise.[25] The phrase 'or otherwise' is sufficiently broad to encompass education in the home (see section 4 below for discussion). Non-attendance is a widespread problem, and parents may be prosecuted, fined and even imprisoned for failing without good reason to meet their obligations in this context, although local authorities do not in practice have sufficient resources to deal with truancy on a systematic and comprehensive basis.

Freedom to establish non-state schools

It is open to individuals or groups, often representing particular faith communities, to establish and run independent schools, and indeed there is a significant independent schools sector in England, from prominent and prestigious independent schools, in some cases ancient foundations with a world reputation, to small schools reflecting particular interests or convictions. An independent school is one at which full-time education is provided for five or more pupils of compulsory school age and which is not maintained by a local authority.[26] There is much variation in the nature of the secular and religious education provided at independent schools, and they are not required to follow the national curriculum, although there is nonetheless a good deal of statutory regulation of such schools, under which they are required to be registered on a register of independent schools kept by the Secretary of State, and to undergo inspection.[27] [28] The regulations set out standards concerning the quality of the education, the 'spiritual, moral, social and cultural development' of the pupils, the welfare, health and safety of the pupils, the suitability of the proprietors and staff, the premises and accommodation, the provision of information, and the manner in which independent schools handle complaints.[29] It is an offence to conduct an unregistered independent school, punishable by fine or even by imprisonment.[30]

The regulations as to the quality of the education require full-time supervised education for pupils of compulsory school age, giving pupils experience in linguistic, mathematical, scientific, technological, human and social, physical and aesthetic and creative education; education by which pupils acquire speaking, listening, literacy and numeracy skills; personal, social and health education reflecting the school's aim and ethos; appropriate careers guidance for secondary pupils; and adequate preparation for the 'opportunities, responsibilities and experiences of adult life'.[31] These requirements do afford a certain degree of prescription as to fundamentals, but nonetheless leave independent school providers with a very broad range of discretion as to the nature and content of the education provided in their school, in recognition of the rights of parents and particular groups within society to preserve aspects of their culture and religious convictions.[32]

There are, however, potentially strong conflicting interests here that the law needs to recognise, including in particular the interests of children, their right to have their eyes opened to a broad range of influences, and their opportunities to participate in wider society in a positive and constructive way when they reach adulthood. Children as well as their parents are the holders of important rights as to the content of their education which it may be that the law has hitherto insufficiently recognised, and the legal regulation of independent schools has a very important role to play in ensuring that children educated in such schools are placed in a position where they will be able to participate to the optimum degree in wider society. The courts may also impose certain limitations in order to protect the rights of children, as illustrated in *R (Williamson) v Secretary of State for Education and Employment* (2005) where the House of Lords rejected claims on the part of parents and teachers at four Christian independent schools that section 548(1) of the Education Act 1996, which prohibited the use of corporal punishment in schools, was contrary to their religious convictions as protected by Article 9 or (in the case of the parents only) under Article 2 of the First Protocol to the ECHR. The parents and teachers supported the infliction of moderate corporal punishment on the basis of their understanding of certain Biblical texts,[33] but the House of Lords took the view that the rights of the children should prevail. Legislative intervention here was held to be justified and proportionate, not least in the light of the children's rights arising under the UN Convention on the Rights of the Child.

Homeschooling

The profile of home schooling has increased in recent years and in particular it has become enmeshed in some controversy and there have been demands for closer regulation in line with the steps that have been taken to increase co-operation between the child protection and education functions of local government.[34] As noted above the right to education is established through a series of overlapping duties and the principal duty of the parent is that in section 7 of the Education Act 1996 which provides that:

> The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—
>
> (a) to his age, ability and aptitude, and

(b) to any special educational needs he may have, either by regular attendance at school *or otherwise*.

The italicised words (emphasis added) require that a child is educated but does not require that education must take place in school. It is this that gives scope for the lawful provision of education at home. This provision was originally in the Education Act 1944 but there were similar provisions as far back as the Education Act of 1870. Patently this legislation is remarkable in its lack of detail and, to compound this, until guidelines were published in 2007 there was little in the way of official guidance on how the duty should be discharged and how local authorities should regulate home education in accordance with their own duties to provide school places and enforce attendance.[35]

There has been relatively little case law on home education, but some clarification was provided in *R v Secretary of State for Education and Science, ex parte Talmud Torah Machzikei Hadass School Trust* (1985) which held that an "efficient education" is one that "achieves that which it sets out to achieve" and "a suitable education" is one that "primarily equips a child for life within the community of which he is a member, rather than the way of life of the country as a whole, as long as it does not foreclose the child's options in later years to adopt some other form of life if he wishes to do so". As to enforcement, where the authority is of the opinion that the child is not receiving efficient education the mechanism for enforcing this is to bring a criminal prosecution of the parent for failing to ensure attendance at school. There are hardly any reported cases on this and it seems that this enforcement power is seldom used. An exception can be found in *Perry v Gwent County Council* (1984) where under the relevant regulations the authority refused to remove the child's name from the school roll despite the parent's contention that the child was receiving a suitable full time education at home. The High Court on an application for judicial review declined to interfere with that decision (see also *Oxfordshire County Council v JL* (2010)). Under section 436A Education Act 2006 inserted by Education and Inspections Act 2006 local authorities have a duty to make arrangements to enable them to establish the identities of children in their area who are not receiving a suitable education but, surprisingly, except where a parent withdraws a child from a school where s/he is a registered pupil, there is no obligation to inform the local authority that the child is being educated at home.[36]

Parents are not required to follow the National Curriculum and there is no statutory obligation for local authorities to monitor the quality of home education on a routine basis. There is a statutory duty under section 437(1) of the Education Act 1996 to intervene where it appears that parents are not providing a suitable education, however it is difficult for authorities to gather the information they need to assess this. The important question of whether a local authority can demand to see the child to assess whether the child is in fact receiving efficient education seems to err on the side of parental autonomy, although this may change in the light of the Inquiry into the death of Khyra Ishaq who was removed from school and said by her mother and her mother's boyfriend to be being home educated. This was accepted by the local authority and she was moved from the school roll and from any effective public oversight. Enquiries can, and according to the guidance should, be made of the parents to see if the education is effective but there is no legal obligation on the part of parents to respond to such enquiries. The guidance states that "it would be sensible for them

to do so", but the meaning of this is hardly clear. One assumes that it must be taken to refer to the likelihood that if they do not provide such information there may be a *prima facie* case that the education they are providing is not suitable under section 437(1) of the Education Act 1996. Parents must assume the full cost of educating their child at home but local authorities are encouraged by the guidance to offer a "consistent, reasonable and flexible" approach to providing support and resources to home educators.

School choice not limited by family income

The problems of terminology abound here as some fee paying schools – those that are truly private in nature - are known as public schools and these sit alongside other fee paying independent schools. However, there are also an increasing number of schools that are referred to as independent schools, but which may not charge fees and obtain almost all of their funding from public sources. These independent schools are in effect an integral part of the state system, though independent of local authority control and access is simply in accordance with each school's admissions policy and not dependent on income. Help with access to fee paying schools however is very limited.

Since the abolition of the Assisted Places scheme in 1997 (the first act of the Blair government) there has been no direct subsidy of places for low income families in England's fee paying schools. Thus, state funding allows parents a considerable choice of school but does not assist with tuition or other fees at fee paying schools. The only exception to this is found in the realm of Special Educational Needs where the system of support for children with learning difficulties can result in places being funded in private establishments. Choice at the publicly funded independent schools (and even the choice to attend a state school that is not the closest to the child's home) might also be constrained by transport costs which are rarely met from public sources.

This implies that there is little in the way of financial assistance for those attending fee paying schools, however it should be noted that many of these schools have charitable status and as such derive a great deal of financial benefit in the form of tax reliefs; effectively providing a public subsidy for private education. There is a tradition that such schools will offer scholarships and bursaries of one sort or another to children from low income families and recent changes to the law introduced by the Charities Act 2008 have provided strong incentives for such schools to offer more scholarship support in order to pass the more stringent test of "public benefit" in order to maintain charitable status and the tax benefits that this attracts.

School distinctiveness protected by law and policy

The right to establish and run non-state schools has already been discussed in section 4 above. Within the state sector, however, the law underpins the provision of a significant amount of variation and distinctiveness in the provision of schools, and indeed the government is currently pursuing a strong policy of encouraging the further development of such distinctiveness. This takes many forms, including the provision of faith schools within

the state sector, the encouragement of a good deal of curricular specialisation and lifting the constraints of the national curriculum in relation to some categories of schools, and the involvement of business and other interested stakeholders in the provision of schools. Most recently, this has also involved the introduction of 'free schools' set up on the basis of local initiatives by parents, faith groups or others, modelled on the lines of certain Swedish schools, and not unlike 'charter' schools in the US. These initiatives are discussed in more detail in the following section.

Distinctive character

As already mentioned in the earlier discussion of the structure of schooling, religious foundation schools operate alongside non-denominational schools within the maintained sector, and indeed were one of the central features of the structural reforms brought about by the Education Act 1944. While in 1944 religious foundation schools were entirely Christian foundations, and overwhelmingly established by Church of England or Roman Catholic authorities, this has in more recent years been changed significantly, reflecting the very different religious and cultural complexion of society in the UK as a whole today. Harris has commented on the ethnically and culturally diverse environment in which education operates in England and Wales, and that the 2001 UK Census indicated that, in addition to 41 million people who described themselves as Christians, there were 1.5 million Muslims, 500,000 Hindus, 300,000 Sikhs, 250,000 Jews, 300,000 of other faiths and 8.5 million of no faith.[37] As would be expected, the UK-wide picture is of only limited value as there are strong geographical concentrations of ethnic minority groups within certain urban areas, including a number of London Boroughs such as Brent, Newham and Tower Hamlets. In the light of the increasing ethnic and religious diversity of the population, coupled with pressure from minority religious groups, it came to be recognised that it was no longer tenable for maintained faith schools to be exclusively Christian foundations, and Tony Blair in particular was receptive to the establishment of non-Christian faith maintained schools. The numbers of such schools, however, remain very small: in 2010, while there were 4,409 Church of England and 1,681 Roman Catholic maintained primary schools in England, there were 29 Jewish, six Muslim, three Sikh and two 'other' maintained primary schools. Among maintained secondary schools in England, 207 were Church of England schools, 331 Roman Catholic, nine Jewish, five Muslim, one Sikh and two 'other'.[38]

While there is therefore some diversity of provision within the state maintained sector in terms of faith schools, it remains the case that the majority of maintained schools are not designated as being of any religious character: in 2010, of the 16,971 maintained primary schools in England, 10,755 were non-faith; and of the 3,332 maintained secondary schools, 2,716 were non-faith.[39] This is not, however, to say that such schools are entirely secular, as religious education and collective worship are an integral element in the educational provision and ethos of all maintained schools in England. Although not included within the national curriculum, religious education is a key element in the 'basic curriculum' of all maintained schools.[40]

The exact position with regard to the content of religious education is somewhat complex, and depends on the categorisation of the school, but briefly, in the case of community

schools and foundation schools which have not been designated as being of a religious character, religious education is given in accordance with an 'agreed syllabus' for the area drawn up by a local conference of representatives, including faith groups and the local authority.[41] The agreed syllabus is also used in those foundation and voluntary controlled schools which are designated as faith schools, though parents may opt for religious education in accordance with the school's trust deed.[42] In the case of voluntary aided schools which are designated as faith schools, however, religious education is given in accordance with the school's trust deed, although parents may opt for agreed syllabus education instead.[43]

The drawing up of agreed syllabuses by conferences comprising local representatives is clearly designed to accommodate diversity and distinctiveness, but the Thatcher Conservative government included within the Education Reform Act 1988 a provision of considerable controversy designed to guarantee an element of centrality for Christianity, as a gesture towards some who were troubled by trends towards multi-faith approaches to religious education. This provided that 'every agreed syllabus shall reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of the other principal religions represented in Great Britain'.[44] This was in effect a compromise provision drawn up amid considerable controversy by the then Bishop of London and intended to give some emphasis to Christianity while containing a sufficient degree of flexibility to meet the interests of other faiths.[45] Central government guidance on religious education strongly emphasises the contribution of religious education towards promotion of community cohesion, commenting that 'it provides a key context to develop young people's understanding and appreciation of diversity, to promote shared values and to challenge racism and discrimination.[46]

It should be noted that parents have an absolute right to withdraw their children from religious education, and are under no obligation to give any reason for this. This applies even in designated faith schools: indeed, such schools are encouraged by the government to admit pupils of other faiths or of none, and therefore the right of withdrawal from religious education may have a particular significance in such schools. The right here is vested in the parent and not in the child, thus potentially giving rise to a conflict between the parent's right under Article 2 of the First Protocol to the ECHR, and the pupil's right under Article 9.[47]

Collective worship is also a legal requirement in all maintained schools, though there is widespread evidence of only partial compliance. In the case of community schools and foundation schools which are not designated as faith schools, the collective worship is required to be 'wholly or mainly of a broadly Christian character'.[48] Collective worship is treated as being of a 'broadly Christian character' if it 'reflects the broad traditions of Christian belief without being distinctive of any particular Christian denomination'.[49] Importantly, this requirement may be modified in the light of the family backgrounds of the pupils.[50] In the case of voluntary schools and foundation schools which are designated as faith schools, the collective worship is in accordance with the school's trust deed. As with religious education, parents have a right of withdrawal, but in relation to collective worship this applies only up to the sixth form.[51] Sixth form pupils themselves have an absolute right to withdraw from collective worship.[52] In practice, the exercise of the right of withdrawal is

exceptional, and the nature and content of the collective act of worship, if carried out at all, is highly variable.

A further very important factor in the development of distinctiveness within educational provision in maintained schools in recent years has been specialisation within the secular curriculum: the last Labour government strongly promoted the development of specialist schools with private sponsorship and additional government funding, and such schools are viewed as centres of excellence in their area. Specialisms include technology, languages, arts, humanities, mathematics, computing, science, music, business and sports. Designated specialist schools are permitted to select up to 10 per cent of their pupils on the basis of aptitude for the relevant specialisation. Specialist status does not exempt local authority maintained schools from the requirements of the national curriculum, but is seen as the addition of a distinct curricular focus and strength.

A further and more radical element of distinctiveness – introduced by the last Labour government and now being strongly promoted by the coalition government – is the 'academies' programme: the government is pursuing a policy of encouraging existing local authority maintained schools to 'convert' to academy status, and wishes new schools (including 'free' schools established by parents and other local groups) to adopt this status. It is also possible for existing schools in the non-state sector to convert and thereby obtain state funding. Academies were first introduced under the Education Act 2002: although described by the government as 'independent' schools, this is a misleading term as, although they are independent of the local authority in which they are located, they receive state funding by virtue of an 'academy arrangement' negotiated between the sponsoring organisation and the Secretary of State. The sponsoring organisation may be a business, a charitable organisation, a faith group or in some cases simply a group of parents, perhaps disenchanted with local authority maintained schools in the area, and who put forward proposals to the Secretary of State for the establishment of a 'free' school.

The establishment of academies is now governed by the Academies Act 2010, under which the Secretary of State may enter into 'academy arrangements' with 'any person'. The proposer must put forward a detailed business plan for approval by the Department for Education, and, in consideration for funding from the department must undertake to establish and maintain a school with defined characteristics.[53] The school must have a curriculum satisfying the requirements of section 78 of the Education Act 2002, which means that it is a 'balanced and broadly based curriculum' which 'promotes the spiritual, moral, cultural and physical development of pupils at the school and of society,' and 'prepares the pupils…for the opportunities, responsibilities and experiences of later life'.[54] Otherwise, however, academies enjoy considerable curricular freedom, and therefore, as we see the incremental growth of academies across the country we will potentially see a corresponding reduction in the reach of the national curriculum and consequently an enhancement of the potential for individuality and distinctiveness. This was made even clearer by the requirement that all academies in the secondary school sector adopt an emphasis on a particular subject area or areas as specified in the 'academy arrangement', although this requirement has been lifted by section 52 of the Education Act 2011. It may be fairly assumed, however, that most in practice will follow the national curriculum, enhanced in the case of most secondary academies by their specialism, but some may be permitted

within the 'academy arrangements' to depart from the national curriculum in some respects, subject to their clear obligation to meet the requirements of section 78 of the 2002 Act. Certain faith groups, and perhaps parent groups, may well seek to make considerable use of their relative curricular freedom, the most obvious example being the academies sponsored by the Vardy Foundation which, although following the national curriculum, include teaching of the notion of creationism.[55]

While it is to be expected that the majority of academies will be existing schools within the local authority maintained sector which choose to 'convert', a limited number of groups of parents and others have already sought to establish 'free' schools with academy status. It will take a very substantial amount of co-ordination and energy on the part of such groups to bring about the establishment of a new academy, including the drawing up of a detailed business plan with detailed proposals as to the school premises and curricular provision, but there is evidence that groups of parents who are deeply dissatisfied with local authority maintained schools in their area are prepared to go to these lengths, in some cases in the face of strong opposition from the local authority, teachers' unions and others. One key reason for opposition to free schools is that the proposers do not need to show that there is an inadequate supply of maintained school places in the area, and thus the establishment of a free school may have the effect of increasing competition for pupils. It remains to be seen, however, how far the free schools initiative will be taken up, although early indications are that the number will be significant: the Department for Education in October 2011 indicated that some 63 free schools had been approved to open from 2012 onwards, of which 12 were characterised as faith schools, and 33 were being set up by local groups, including teachers, parents, charities and community groups.[56] This provides a very clear example of the shift in government policy towards individuality and distinctiveness in educational provision within the state sector.

Decisions about admitting pupils

The precise nature of the obligations that schools are under in respect of admissions varies, as one would expect, with the type of school. The basic premise of the law on school admissions (at least those in the public sphere) is that parents have the right to choose which school their child will attend, not that the school may choose the pupil. Equally education in both the public and the private spheres is subject to equality law as now found in the Equality Act 2010. That said there are provisions in both bodies of law that permit exceptions to allow for the character of the school to be recognised. In particular faith schools have some scope to take religious faith into account and in addition single sex schools may maintain their character through exceptions to the sex discrimination provisions of the Equality Act 2010. Some schools are also permitted to take ability and aptitude into account in a range of closely regulated circumstances. The law regulating school admissions has been subject to a high degree of criticism over many years as law and guidance has sought to preserve the principle of parental choice, and where there is competition for places that allocations should be made on a fair and objective places, whereas there is clear evidence that schools have been tempted to subvert the rules to choose the pupil.

As such the current statutory guidance on school admissions, The Admissions Code 2012, emphasises the importance of ensuring equity and fair access. . In the introduction to the code at paragraph 14 it is emphasised that "In drawing up their admission arrangements, admission authorities must ensure that the practices and the criteria used to decide the allocation of school places are fair, clear and objective." Admission authorities must ensure that their arrangements will not disadvantage unfairly, either directly or indirectly, a child from a particular social or racial group, or a child with a disability or special educational needs, and that other policies around school uniform or school trips do not discourage parents from applying for a place for their child. The Code applies to community and voluntary schools, but academies are bound by provisions in the agreements by which they are established to secure equivalent standards in the regulation of admissions.

The basic approach that the law takes is that a parent may express a preference as to which school their child should attend and that if the school has sufficient places then this choice must be complied with.[57] The only exceptions that apply to this basic position is that schools may maintain empty places even where applications for places have been made where this is necessary to protect the status of the school as a selective school or in a very few cases where the school has a religious status that attracts special status.

Clearly as such the point at which schools have discretion as to who shall be admitted applies only where the school is over subscribed. This discretion is however highly regulated in that it must be exercised in accordance with pre- established and published criteria. These criteria are established through a highly regulated process which involves consultation with the public and other interested parties and which must be approved by the School's Adjudicator. The basic principle is that criteria should be clear, objective and fair, however beyond that the admissions authority (which will in many cases be the school itself) have considerable autonomy in setting the criteria.

The tendency that schools have had to subvert the process and use oversubscription is well documented in a number of reports, notably that of the Local Government Ombudsman in 2004. Other criticisms of the process – notably by the School's Adjudicator - led to revisions of the Code and its establishment as having mandatory status in law. Of particular note is section 88A of the School Standards and Framework Act 1998 (inserted by section 44 of the Education and Inspections Act 2006) which introduced a general prohibition of interviews of pupils or their parents as part of the applications procedure, a practice that had long been discouraged by the earlier (non-mandatory) manifestations of the Code.

An area which raises particular concerns is that of applications for places at selective schools: these are a minority within the state system consisting of schools that selected on the basis of ability before the school year 1997-98. Other than these the only form of selection is for the purposes of "banding" where admissions criteria are approved to allow a school to achieve a balanced range of abilities, and for entry into the "sixth form" where pupils study beyond the age of compulsory attendance to achieve higher qualifications.[58] Specialist schools by way of comparison are able to select up to 10% of their pupils on the basis of aptitude in the school's specialism, which might be modern languages, sport or science.
We have already noted schools' ability to devise admissions criteria that relate to the ethos

of the school and this is especially important in the case of faith schools. However, the ability to take religion into account is widely accepted as legitimate even in schools that do not have protected religious status. Valid entry criteria can include membership of a particular religious group or support of a school's Christian (or other religious) ethos as long as the criterion chosen to establish whether this is met is susceptible to objective assessment.[59]

The limits of this principle were met in the first case decided in the new Supreme Court (replacing the House of Lords as the highest court in the UK) *R (E) v JFS School* (2009) where it was held that a child could not be refused a place in an orthodox Jewish school on the basis that his mother was a convert to the faith and not born into the religion. These principles are now contained in the Equality Act 2010 and the case was decided on the basis of race discrimination not religious discrimination. The overlap between race discrimination and religious discrimination is a result of the fact that since the 1980s it has been accepted in UK law that some religions obtain the protection of the race discrimination provisions on the basis that the adherents are members of an ethnic group.[60] In the *JFS* case, the majority of the Supreme Court found that the mother had been discriminated against on the basis of race rather than religion and there is no provision of the Equality Act 2010 or the predecessor legislation to enable any exception to be made in cases of direct race discrimination. This has been highly controversial but is no doubt correct in terms of legal doctrine, however it produces the paradoxical effect that the elevated status given to some religions by inclusion in the definition of race could be used to doubt the validity of a criterion that is no doubt intended to provide for the transmission of cultural values. It is especially ironic given that the definition of ethnic group derives from the long history of community demonstrated by those of the Jewish faith and that as an Italian mother who had converted to the faith the successful applicant was not herself born into this long tradition.

Decisions about staff

As noted in part 6 above, a number of schools, some of them voluntary schools and some foundation schools have a designated religious character. These schools have partial exemptions from the Equality Act 2010 which would otherwise make selection and other treatment on the basis of religion direct discrimination on grounds of religion or belief. This is outlined in schedule 22 of the 2010 Act.

The first exemption, in paragraph 3(2)(a) of schedule 22 of the Equality Act 2010, relates to the employment of the head teacher or principal of an educational establishment where this is needed to comply with a requirement in the school's founding instrument that the head must be a member of a particular religious order. Paragraph 4 of schedule 22 of the Equality Act 2010 then outlines 3 further sets of exemptions in the School Standards and Framework Act 1998 for employment in such schools. This means that action permitted by section 58(6) or (7) of the School Standards and Framework Act 1998 which relate to the dismissal of teachers because of failure to give religious education efficiently; sections 60(4) and (5) of the School Standards and Framework Act 1998 which allows religious considerations relating to certain appointments; or section 124A of the School Standards and Framework Act 1998 which allows preference to be given for certain teachers at independent schools of

a religious character does not amount to discrimination under the Equality Act 2010.

Section 58 of the School Standards and Framework Act 1998, which refers to the appointment and dismissal of some categories of teachers at schools with a religious character, makes provision for foundation or voluntary controlled schools with a religious character to reserve a fifth of their posts for those who are fit and competent to give religious education and to appoint reserved staff or dismiss reserved staff if they have failed to give such religious education efficiently and suitably. It also permits voluntary aided schools to dismiss staff if they have failed to give religious education efficiently and suitably without the permission of the local authority.

In addition to section 58 of the School Standards and Framework Act 1998 which protects the value of having appropriate persons to give religious education, section 60 of the same Act goes further and allows a foundation or voluntary school, in the appointment of a person to be head teacher of the school to have regard to the applicant's ability and fitness to preserve and develop the religious character of the school (NB this is superfluous where the post of head teacher is a reserved post). A voluntary aided school may also go further and give preference in the appointment, remuneration or promotion of teachers at the school, to persons whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school. Similar preference applies to those who attend religious worship in accordance with those tenets, and to those who give, or are willing to give, religious education at the school in accordance with those tenets. Further, in cases of termination of the employment or the engagement of any teacher at the school, regard may be had to any conduct which is incompatible with the precepts, or with the upholding of the tenets, of the relevant religion or religious denomination.

The final set of exemptions applies to the employment of teachers at independent schools having a religious character. This is found in section 124A of the School Standards and Framework Act 1998 which allows preference to be given, in connection with the appointment, promotion or remuneration of teachers at the school, to person whose religious opinions are in accordance with the tenets of the religion or the religious denomination specified in relation to the school,[61] or who attend religious worship in accordance with those tenets, or who give, or are willing to give, religious education at the school in accordance with those tenets. Similarly, in cases of termination of employment or the engagement of any teacher at the school, regard may be had to any conduct which is incompatible with the precepts, or with the upholding of the tenets, of the religion or the relevant religious denomination.

It is possible that some schools with a religious ethos might also be able to maintain that being of a particular religion or belief is an occupational requirement for other posts under the European Framework Directive 2000/EC/78 and schedule 9 of the Equality Act 2010. However, given that the teaching exceptions are defined exhaustively in other legislation one would expect the proportionality test established in the general law to be applied rigorously. Further guidance might also be obtained from a sex/pregnancy discrimination case, *O'Neill v Governors of Thomas More School* (1996), where an unmarried teacher who

was engaged to provide religious education and was expected "to make the ideologies and teachings of the Roman Catholic faith clear to pupils in order to maintain the ethos of the school as a Roman Catholic school" was dismissed having become pregnant due to her relationship with a Roman Catholic priest. This dismissal was found to be actionable as both unfair dismissal[62] and as pregnancy discrimination which is unlawful under the terms of what is now the Equality Act 2010.

Accountability for school quality

There are two basic mechanisms designed to promote accountability for quality in schools. Historically when the majority of schools were under local authority control quality was addressed by a combination of central government functions under Her Majesty's Chief Inspector of Schools (HMCI) and local government advisory services and inspection functions. This system was overhauled by the Education (Schools) Act 1992 (now much amended) and since then state schools have been subject to inspection and report by OFSTED (originally the Office for Standards in Education and now the Office for Standards in Education Children's Services and Skills) a non-departmental government body which is still headed by HMCI. Second, schools are subject to a quasi-market mechanism in that the publication and classification of publicly available data (including that produced by OFSTED) about schools is published in the form of "league tables" and this is intended to have an impact on the popularity of schools. As funding follows pupils the intention is that schools will compete for pupils in order to increase the income that comes with them. These rankings are highly dependent on pupil performance in public examinations. However as already noted this form of accountability is to be set in the context of a system where the majority of state funded schools are required to follow the National Curriculum. The schools subject to inspection are set out in s 5 of the Education Act 2005 and includes maintained schools and those publicly funded schools that are independent of local authorities. The genuinely independent (private) schools are not subject to OFSTED inspection but OFSTED nevertheless oversees the work of the Independent Schools Council which is a body set up to perform a similar function by a membership organisation. In addition, OFSTED has a role in relation to boarding school welfare inspection which is a feature of its expanded remit for children's services more generally. That aside, private schools are of course subject to a genuine market in education, however league table style information may cover schools from both sectors.

Community, foundation and voluntary schools (including special schools), maintained nursery schools, Academies, city technology colleges, city colleges for the technology of the arts, and some non-maintained special schools are subject to periodic OFSTED inspection by section 5 of the Education Act 2005 and a report is published following such inspection. The HMCI is under a duty to carry out further inspections when asked to do so by the Secretary of State and has a discretion to carry out further inspections.[63] These might be triggered by a further provision which is the HMCI's power to investigate complaints under section 11A Education Act 2005. The general duty of the HMCI, when conducting these inspections is to report on:- the quality of the education provided in the school; how far the education provided in the school meets the needs of the range of pupils at the school; the educational standards achieved in the school; the quality of the leadership in and

management of the school; including whether the financial resources made available to the school are managed effectively, the spiritual, moral, social and cultural development of the pupils at the school; the contribution made by the school to the well-being of those pupils; and the contribution made by the school to community cohesion. Mainstream schools are inspected in terms of how the needs of disabled pupils are met. The inspection may not consider denominational education or the content of collective worship.

Schools are graded in these areas of activity on a scale of outstanding, good, satisfactory and inadequate. The more successful a school is the less frequent the inspection and those graded as inadequate may find themselves subject to the very real control of being placed in "special measures" or alternatively subject to intervention as "in need of significant improvement".[64] In these cases the local authority can be called upon to decide whether to take action. The definition of "special measures" is found in section 44 Education Act 2005 which provides "special measures" are required if the school is failing to give its pupils an acceptable standard of education, and the persons responsible for leading, managing or governing the school are not demonstrating the capacity to secure the necessary improvement in the school. A school requires "significant improvement" if it is performing significantly less well than it might in all the circumstances reasonably be expected to perform.

The consequences of maintained schools finding themselves in either of these circumstances is that the local authority and or the Secretary of State may intervene to direct under Part 4 of the Education and Inspections Act 2006 that: the school enters arrangements for support with another school or body; that additional governors be appointed; that the governing body is replaced by a body consisting of interim executive governors or to suspend the delegated budget- holding powers. The purpose of these measures is to address the concerns and remove the school from the scope of these powers, but the most draconian of these provisions is found in section 68 of the Education and Inspections Act 2006 which allows the Secretary of State, subject to various procedures, to close a school in special measures. Local authorities have further independent powers to intervene to issue a warning notice under section 60 of the Education and Inspections Act 2006 where they are satisfied that:- the standards of performance of pupils at the school are unacceptably low; there has been a serious breakdown in the way the school is managed or governed which is prejudicing, or likely to prejudice, such standards of performance; or the safety of pupils or staff of the school is threatened. The notice will specify the action that should be taken. The system is subject to supervision by HMCI if the governing body make representations, but subject to this if the warning notice is not complied with the powers of intervention available for schools in special measures and those that require significant improvement are available to the local authority.

In addition to these direct measures the government have also been able to exert significant control over the professional standards both through control of the training of teachers and via professional registration of teachers. Until recently training was controlled by the Training and Development Agency for Schools (TDA) and professional registration via the General Teaching Council (GTC). The Education Act 2011 transferred these key functions to the Secretary of State and also made provision for teachers to serve an induction period.

Teaching of values

Values provisions are deeply embedded within the public education system of England. This is primarily manifested in five areas. First in terms of the basic curriculum that schools must offer, second in the values that must underpin sex education given in school, third in the provisions of citizenship which is a required element of the National Curriculum, fourth in a requirement of political neutrality and finally in relation to the requirement to provide a daily collective act of worship. The place of religious education, faith schools and collective worship has been discussed already so here we consider the remainder of the curriculum, sex education, citizenship education and the requirement of political neutrality.

The legal requirements pertaining to the basic curriculum are now to be found in section 80 of the Education Act 2002. This means that all maintained schools must offer religious education and the National Curriculum and all maintained secondary schools must offer sex education. Section 78 of the Education Act 2002 sets out that a general requirement of the curriculum of a maintained school is that it is balanced and broadly based; promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and of society; and prepares pupils at the school for the opportunities, responsibilities and experiences of later life. As noted earlier the same is applied to Academies by section 78 of The Education Act 2002 and is also included in relation to projects designed to allow the lifting of the National Curriculum where this is permitted by section 1 of the Education Act 2002. As such values are absolutely central to the public education system.

Sex education given in school has been an ideological minefield almost since its inception, but increasingly from the 1970s with the conflict between traditionalist and progressive approaches taking this as a principal battleground.[65] The modern approach was established by the Education Act 1993 when the responsibility for the sex education curriculum was removed from local education authorities and given to school governing bodies. This required all schools to have a sex education policy and all secondary schools to provide such sex education as did not form part of the compulsory subject of science in the National Curriculum. This compulsory part of the curriculum currently includes the human reproductive cycle, including adolescence, fertilisation and fetal development at key stage 3.[66] The remainder of the sex education curriculum has its basis in the policy of the school's governing body and is subject to a parental right of withdrawal now in Section 405 of the Education Act 205.

The statutory values basis of sex education was first established by section 46 of the Education (No.2) Act 1986 and is now found in expanded form in section 403 of the Education Act 1996 which states that "The . . . governing body and head teacher shall take such steps as are reasonably practicable to secure that where sex education is given to any registered pupils at a maintained school, it is given in such a manner as to encourage those pupils to have due regard to moral considerations and the value of family life." Further

provisions were added by the Learning and Skills Act 2000 to require that guidance issued by the Secretary of State should be designed to secure that registered pupils at maintained schools "...learn the nature of marriage and its importance for family life and the bringing up of children, and ....are protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned.".[67] We have already noted the controversy raised by the now repealed section 28 of the Local Government Act 1988: although this had no direct application to schools it was widely felt to have had a chilling effect on schools' ability to deal with questions of homosexuality as part of sex education and together with the "family" values expressed in statute this has been criticised for marginalising any family arrangements which fail to conform to the stereotypical norm of a married heterosexual couple and their children.[68] [69]

Central control of the curriculum has an overarching aim for all young people to become *inter alia* responsible citizens who make a positive contribution to society, and since 2002 the subject of citizenship has been a required element of the National Curriculum. The citizenship curriculum is diverse and not uncontested and with the government currently reviewing the content of the National Curriculum this subject is vulnerable. However, for the time being citizenship is included at all key stages although the content is only specified by statute in the secondary stage of education. There is only space for a flavour of its reach here, so for example, at key stage 4 the curriculum includes democracy and justice, rights and responsibilities, and consideration of the demands of living together in a diverse society.[70] This document also identifies what is seen as the importance of citizenship.

"Education for citizenship equips young people with the knowledge, skills and understanding to play an effective role in public life. Citizenship encourages them to take an interest in topical and controversial issues and to engage in discussion and debate. Students learn about their rights, responsibilities duties and freedoms, and about laws, justice and democracy. They learn to take part in decision-making and different forms of action. They play an active role in the life of their schools, neighbourhoods, communities and wider societies as active and global citizens." The Qualifications and Curriculum Development Agency is a victim, along with the TDA and the GTC, of the "bonfire of the quangos" initiated by the coalition government in 2010 and its functions have been transferred to Ofqual, The Office of Qualifications and Examinations Regulation under the Chief Regulator of Qualifications and Examinations.

Finally, it is worth noting that the competition between progressive and traditional values that led to the insertion of the values provisions into legislation on sex education in 1986 was complemented by a similarly bitter dispute over the way in which political values were considered in schools. This led to the enactment of section 44 of the Education No.2 Act 1986 which was designed to ensure political neutrality. These provisions are now found in section 406 of the Education Act 1996 which states that local authorities, governing bodies and head teachers must forbid the pursuit of partisan political activities by junior pupils at maintained schools, and the promotion of partisan political views in the teaching of any subject. It is by no means certain as to whether this is because this is seen as harmful to children or to society, and no doubt there would be much room for debate as to whether the

exclusion zone this creates has more potential to harm than to prevent harm. However one justification for the inclusion of such is that it does help to achieve the standards set out in the second clause of the right to education in the first protocol of the ECHR and as such complements the general principle set out in section 9 of the Education Act 1996 that "pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure" as a partisan approach would be certain to conflict with some parents' wishes.

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